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Federal Communications Commission

FCC 96-277

DISPATCH

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matters of	)	PR Docket No. 93-231
	)	
Imposition of a Forfeiture Against	)	
	)	
CAPITOL RADIOTELEPHONE, INC.	)	
d/b/a Capitol Paging	)	
1420 Kanawha Blvd. E	)	
Charleston, West Virginia 25301	)	
	)	
Former Licensee of Station WNSX-646 in	)	
the Private Land Mobile Radio Services	)	
	)	
and	)	
	)	
Revocation of License of	)	
	)	
CAPITOL RADIOTELEPHONE, INC.	)	
d/b/a Capitol Paging	)	
1420 Kanawha Blvd. E	)	
Charleston, West Virginia 25301	)	
	)	
Licensee of Station WNDA-400 in the	)	
Private Land Mobile Radio Service	)	
	)	
and	)	
	)	
Revocation of License of	)	
	)	
CAPITOL RADIO TELEPHONE, INC.	)	
d/b/a Capitol Paging	)	
1420 Kanawha Blvd. E	)	
Charleston, West Virginia 25301	)	
	)	
Licensee of Station WNWW-636 in the	)	
Private Land Mobile Radio Services	)	
	)	
and	)	
	)	

Revocation of License of )  
)  
CAPITOL RADIO TELEPHONE COMPANY, )  
INC. )  
1420 Kanawha Blvd. East )  
Charleston, West Virginia 25301 )  
)  
Licensee of Station KWU-373 in the )  
Public Mobile Radio Service )  
)  
and )  
)  
Revocation of License of )  
)  
CAPITOL RADIOTELEPHONE COMPANY, )  
INC. )  
P.O. Box 8305 )  
South Charleston, West Virginia 25303 )  
)  
Licensee of Station KUS-223 in the )  
Public Mobile Radio Service )  
)  
and )  
)  
Revocation of License of )  
)  
CAPITOL RADIOTELEPHONE CO., INC. )  
1420 Kanawha Blvd. East )  
Charleston, West Virginia 25301 )  
)  
Licensee of Station KQD-614 in the )  
Public Mobile Radio Service )  
)  
and )  
)  
Revocation of License of )  
)  
CAPITOL RADIOTELEPHONE COMPANY, )  
INC. )  
1420 Kanawha Blvd. East )

Charleston, West Virginia 25301 )  
)  
Licensee of Station KWU-204 in the )  
Public Mobile Radio Service )

### MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1996

; Released: July 11, 1996

By the Commission:

1. This memorandum opinion and order modifies a decision of the Review Board, which imposed a \$6,000 forfeiture against Capitol Radiotelephone, Inc. d/b/a Capitol Paging (Capitol)<sup>1</sup> for violations of Part 90 of the Commission's Rules. Capitol Paging, 11 FCC Rcd 2335 (Rev. Bd. 1996). We will reduce the forfeiture to \$2,000, having reviewed the record and concluded that an additional \$4,000 is not warranted.

#### I. INTRODUCTION

2. Capitol provides mobile radio services in the area around Charleston, West Virginia, and paging services throughout West Virginia and parts of Ohio. For some time, Capitol has provided common carrier paging service under Part 22 of the Commission's rules. In 1990, Capitol augmented its paging services by operating private carrier paging (PCP) facilities licensed under Part 90 of the Commission's Rules.<sup>2</sup> Capitol's PCP operations shared a channel on 152.48 MHz with RAM Technologies, Inc. (RAM).

#### II. BACKGROUND

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<sup>1</sup> For convenience, we will, where appropriate, use "Capitol" to refer to the above captioned entities collectively.

<sup>2</sup> Capitol's authorization for those PCP facilities was set aside when this proceeding was designated for hearing and its application for the PCP facilities was returned to pending status. Before the hearings began, Capitol dismissed its application for the PCP facilities. Although Capitol no longer holds these facilities, it may nevertheless be liable for a forfeiture as their former licensee. Thus, these facilities remain in the caption of this proceeding.

3. This proceeding arose out of RAM's repeated complaints of harmful interference by Capitol and information developed by Commission field personnel raising a substantial and material question of whether Capitol willfully and repeatedly violated the Communications Act and the Commission's Rules in connection with its PCP operations. Capitol Paging, 8 FCC Rcd 6300 (1993). After a hearing, Administrative Law Judge Joseph Chachkin concluded that Capitol did not willfully or repeatedly violate the Commission's Rules or make misrepresentations or lack candor before the Commission. Capitol Paging, 9 FCC Rcd 6370, 6377 ¶¶ 55 (ALJ 1994). Rather, the ALJ found that the allegations against Capitol reflected an intent by RAM to avoid sharing the channel with Capitol. Id. at 6378-79 ¶¶ 63-65.

4. The Board affirmed the initial decision in most respects. However, the Board found that the ALJ had "glossed over" evidence concerning certain alleged violations and therefore made its own findings as to these matters. 11 FCC Rcd at 2338 ¶ 8. The Board found that Capitol violated 47 C.F.R. § 90.403(e), which requires licensees to take reasonable precautions to avoid causing harmful interference. The Board also found that Capitol violated 47 C.F.R. § 90.405(a)(3), which requires licensees, when conducting tests for proper station and system maintenance, to keep testing to a minimum and to employ every measure to avoid harmful interference. Finally, the Board found that Capitol violated 47 C.F.R. § 90.425(b)(2), which requires licensees to transmit station identification information by Morse code at a rate of 20-25 words per minute. Id. at 2341 ¶ 26.

5. As found by the Board (11 FCC Rcd at 2338 ¶¶ 8-9), these violations were based on monitoring and inspection of Capitol's facilities conducted over four days, August 12-15, 1991, by FCC investigators James Walker and Donald Bogert. During that period, the inspectors observed that Capitol's facilities repeatedly transmitted a series of identical sequential tones unaccompanied by any messages. The tones lasted approximately 20 seconds and occurred once per minute. They were observed morning, afternoon, and evening, perhaps as late as midnight. Capitol's President initially told Walker and Bogert that Capitol was range testing for a new control link frequency, but later told them that the testing was to determine the coverage of the paging system. When Walker and Bogert attempted to examine the automatic test function programmed into Capitol's paging terminal, the transmissions abruptly ceased. Upon inspection, the testing function was found to have been disabled and the test set-up deleted. Additionally, during the monitoring, the investigators observed that Capitol's Morse code identifier was being transmitted at seven words per minute instead of the 20-25 words per minute required by the rules.

6. The Board, reversing the ALJ, credited the opinion of the Commission investigators, who testified that the testing was excessive, and rejected that of Capitol's

expert witness, Arthur Peters, who testified that it was not. 11 FCC Rcd at 2340-41 ¶¶ 24-25. However, the Board further held that, while a close question, the record did not establish that the transmissions indicated a malicious intent to interfere with RAM's operations. *Id.* In the absence of such malicious intent, the Board found that the violations did not implicate Capitol's basic qualifications. *Id.* at 2341 ¶ 27. The Board imposed a \$4,000 (\$1,000 per day for four days) forfeiture for violation of 47 C.F.R. § 90.403(e), and forfeitures of \$1,000 (\$250 per day for four days) each for violation of 47 C.F.R. § 90.405(a)(3) and 47 C.F.R. § 90.425(b)(2). *Id.* at 2341-42 ¶ 28. As an additional matter, the Board deleted findings by the ALJ that RAM had engaged in a deliberate campaign to drive Capitol from the channel. *Id.* at 2342 ¶ 32.

### III. APPLICATION FOR REVIEW

7. In an Application for Review, filed March 25, 1996, Capitol contends that the Commission should reinstate the ALJ's initial decision in all respects. According to Capitol, the Board's findings that Capitol committed rule violations contain numerous defects. For example, Capitol asserts that the Board should have, like the ALJ, credited Peters' testimony that Capitol's testing was not excessive. Capitol also urges that the Commission should adopt the ALJ's conclusion that, even if Capitol violated the rules, no forfeiture should be imposed because a mere warning was issued to RAM by the Bureau for its derelictions. In this regard, Capitol argues that the Board should not have deleted the findings adverse to RAM, which are amply supported by the record. Capitol concludes that it has been the victim of RAM's anticompetitive campaign, rather than a perpetrator of misconduct. The Wireless Telecommunications Bureau and RAM oppose the application for review.

### IV. DISCUSSION

8. We uphold the conclusion that Capitol violated 47 C.F.R. § 90.405(a)(3) and 47 C.F.R. § 90.425(b)(2), but reject the conclusion that Capitol violated 47 C.F.R. § 90.403(e). We modify the forfeiture accordingly.

9. We note at the outset that aspects of Capitol's application for review do not conform to the Commission's procedural rules. Capitol argues (at 3 n. 1) that the errors in the Board's decision are too numerous to set forth in a 10-page application for review and refers the Commission to arguments contained in Capitol's reply to exceptions, filed with the Board. Capitol's attempt to challenge the Board's findings and conclusions in a generalized fashion with reference to its pleadings below does not concisely and plainly state the questions presented for review with reference to the appropriate findings of fact and conclusions of law, as required by 47 C.F.R. § 1.115(b)(1). See also Adjudicatory Re-regulation Proposals, 58 FCC 2d 865, 875-76 ¶ 33 (1976). Moreover, to the extent that it

seeks to incorporate by reference arguments made in its 24 page reply to exceptions. Capitol effectively violates the 10-page limitation on applications for review set forth in 47 C.F.R. § 1.115(f)(1). See Gilbert Broadcasting Corp., 69 FCC 2d 2067, 2095 n.58 (Rev. Bd. 1978), citing, Belo Broadcasting Corp., 61 FCC 2d 10, 11 ¶ 4 (1976). We will therefore consider only those arguments specifically raised by the application for review as "examples" and not those raised only generally or by reference.

10. Turning to the specific arguments raised by Capitol, we uphold the conclusion that Capitol violated 47 C.F.R. § 90.405(a)(3). We reach this conclusion despite finding that Capitol has raised a legitimate objection to the Board's basis for crediting the opinion of the Bureau's witnesses, Walker and Bogert, that Capitol's testing was excessive over the opinion of Capitol's witness, Peters, that it was not. We disagree with the Board's finding that: "[Walker] and Bogert were in a superior position to accurately assess the facts." 11 FCC Rcd at 2341 ¶ 24. As Capitol correctly points out, Peters had the opportunity to review the relevant record evidence including the testimony and written report of Walker and Bogert. The Board therefore erred to the extent that it discounted Peters' testimony on the premise that he was unfamiliar with the facts. Nevertheless, as discussed in the following paragraphs, we agree with the Board that the evidence more accurately supports the conclusions reached by Walker and by Bogert than those reached by Peters.

11. We agree with the Board that Peters' testimony indicates only that he did not consider the type of testing conducted by Capitol excessive per se, even if over a prolonged time period, assuming that it had a legitimate purpose. However, he did not indicate that he actually knew the specific purpose of Capitol's prolonged testing. Tr. 1129-30, 1142-43, 1175-76. Indeed, Peters testified that Capitol (and RAM) did not know what proper testing is for paging. Tr. 1125, 1157.

12. The record does not reflect a consistent or credible explanation for Capitol's virtually round-the-clock testing. The inspectors' report indicates that Capitol's President, Dan Stone, first told them that the testing was for the purpose of range testing for a new control link frequency, but when the validity of this explanation was questioned, he inconsistently stated to the investigators that the testing was to determine the coverage of the paging system. Exh. PRB-12 at 3. Capitol's direct case indicates that the testing of a "group call" feature and of system coverage occurred, but does not relate this claim to the transmissions observed by the investigators. Exh. CAP-22 (Direct Testimony of Russell Harrison).

13. Other circumstances also undermine the claim that the testing was legitimate. The inspectors' report indicates that the testing ceased abruptly, the automatic test function in Capitol's paging terminal was disabled, and the test pager number was deleted after they

arrived. It also indicates that a Capitol staff member admitted that no one was in the field to receive the tests at that time. Exh. PRB-12 at 3-4. The lack of a credible justification for the prolonged testing and the suspicious circumstances disclosed during the inspection amply support the finding that the testing was not the minimum required for proper station and system maintenance, as the rule requires. Thus, the record supports the conclusion that Capitol was in violation of 47 C.F.R. § 90.405(a)(3) on each of the four days that the testing was observed. Capitol's application for review does not specifically contest the finding that it was in violation of 47 C.F.R. § 90.425(b)(2) -- the Morse code rule -- on each of the four days. Thus, a forfeiture in the amount of \$2,000 for these violations is warranted.

14. We do not, however, discern a basis for the Board's finding that Capitol violated 47 C.F.R. § 90.403(e), the rule requiring reasonable precautions to avoid causing harmful interference. The Board found that the inspectors observed that Capitol and RAM both "walked on" each other's transmissions, i.e., began transmitting while the other was still on the air. 11 FCC Rcd at 2338 ¶ 9. As explained below, with respect to RAM, this resulted from its use of a timer that automatically initiated transmissions after two minutes even if Capitol was on the air. With respect to Capitol, the Board found that Capitol used an "inhibitor," or monitoring device, to ensure that the channel was vacant when it initiated its transmissions (the testing previously discussed). *Id.* at 2339-40 ¶¶ 16-18. The Board credited testimony that the equipment used conformed to accepted industry standards. *Id.* The Board also found that the instances in which Capitol walked on RAM's signal did not significantly disrupt RAM's service and may have been due to the inefficient functioning of Capitol's channel monitor caused by transient factors beyond Capitol's control, such as local traffic and signal fade. *Id.* at 2341 ¶¶ 25, 27; Exh. CAP-23 at 11. The Board declined to fault Capitol for not taking additional precautions based on the relatively few instances where Capitol walked on RAM's signal. 11 FCC Rcd at 2340 ¶ 18. This is in accord with Section 90.403(e), which provides that "[reasonable precautions] include monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference."

15. Nevertheless, the Board found a violation of 47 C.F.R. § 90.403(e) and imposed a forfeiture of \$1,000 a day for four days. The Board appears to have relied on the Commission's decision in Texidor Security Equipment, Inc., 4 FCC Rcd 8694 (1989), which the Board construed as involving a situation in which "a licensee's continuous utilization of a shared channel prevented another licensee from using the frequency." 11 FCC Rcd at 2341 ¶ 28. In other words, the Board appears to have reasoned that Capitol's excessive testing in itself constituted a violation of 47 C.F.R. § 90.403(e), irrespective of whether or not Capitol walked on RAM's transmissions or used a channel monitoring device, because the excessive testing reduced the air time available to RAM. See also Private Radio Bureau's Exceptions, filed November 30, 1994 at 3-4 ("Walking" on Another Transmission Not Required).

16. We reject this line of reasoning. Part 90 of the Commission's Rules contains provisions that require licensees to minimize the extent of their transmissions in order to maximize the shared utilization of channels. See 47 C.F.R. §§ 90.403(c), 90.405(a)(3) (which Capitol violated). We see no justification for treating violation of these rules as an automatic violation of the interference rule. Such an approach disregards the specific meaning of "interference" in the Commission's rules and thereby obscures the specific purpose of the interference rule. While, in one sense of the word, excessive use of a shared channel "interferes with" another's use of the channel, this is not the sense in which "interference" is used in the rule. The Commission's Rules define "interference" in the sense used in electrical engineering to describe a particular physical phenomenon that does not depend on whether a channel is shared. Interference is "[t]he effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation or loss of information which could be extracted in the absence of such unwanted energy." 47 C.F.R. § 2.1.<sup>3</sup> See also 47 C.F.R. § 90.7 ("harmful interference" is "any emission, radiation, or induction which specifically degrades, obstructs, or interrupts the service provided by [Part 90] stations"). Accord 47 C.F.R. §§ 15.3(m), 21.2, 73.182, 74.903(a)(2), 76.613(a), 97.3(a)(22). Licensees are required to avoid causing this phenomenon.

17. The facts of Texidor, cited by the Board, are consistent with this definition. In Texidor (4 FCC Rcd at 8694 ¶ 7), the licensee was cited for:

. . . failing to monitor the transmitting frequency . . . prior to using it and, therefore, causing harmful interference to co-channel users. . . . [Texidor] was observed radiating a steady carrier and transmitting data without first monitoring the channel for prior occupancy by other users. . . .

Because the record indicates that Capitol took reasonable precautions to avoid harmful interference by monitoring the channel to determine that it was not in use before initiating transmissions, we find no violation of 47 C.F.R. § 90.403(e) and will delete the \$4,000 forfeiture imposed by the Board on this ground. As explained above, we affirm the Board's

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<sup>3</sup> See also IEEE STANDARD DICTIONARY OF ELECTRICAL AND ELECTRONIC TERMS (1977 ed.) at 347: "Interference in a signal transmission path is either extraneous power which tends to interfere with the reception of the desired signals or the disturbance of signals which results."



imposition of \$1,000 each for violations of 47 C.F.R. § 90.405(a)(3) and 47 C.F.R. § 90.425(b)(2).

18. In this regard, we decline to adopt the ALJ's suggestion that no forfeiture should be imposed against Capitol even if violations occurred, because RAM received only an admonition for violating the rules. 9 FCC Rcd at 6381 n.28. RAM was found to have violated 47 C.F.R. § 90.403(e) by installing a timer and monitoring device that had the effect of initiating RAM's transmissions if the channel was not in use or after two minutes, whichever came first. Exh. CAP-25 (letter from Richard J. Shibben, Chief, Land Mobile and Microwave Division, to Ram Technologies, Inc. (July 30, 1992)). Use of the timer caused RAM to "walk on" Capitol's transmissions by initiating its own communications after two minutes, even if Capitol was on the air. No forfeiture was imposed against RAM, however, because of what were deemed to be mitigating circumstances. The relevant circumstances were that, in the Bureau's view, the transmissions by Capitol that RAM "walked on" were considered to be primarily for the purpose of obstructing RAM's operations. Interfering with them was treated as less serious by the Bureau than interfering with legitimate transmissions. Nevertheless, RAM was admonished that future use of the timer could result in forfeiture or revocation.

19. The record before us suggests that the lenient treatment of RAM for its serious violation of the rules may well have been unwarranted. However, the time limit for imposing a forfeiture against RAM has expired. While it is unfortunate that RAM will not be held accountable for any violations that it committed to the same extent as Capitol, the fact that a forfeiture cannot now be imposed against RAM does not excuse Capitol's violations. In view of the applicable procedural limitation, Capitol cannot claim to be similarly situated with RAM and entitled to equal treatment. The forfeiture against Capitol will therefore stand.

20. As an additional matter, we affirm the Board's deletion of the adverse findings made by the ALJ concerning RAM. 11 FCC Rcd at 2342 ¶ 32, vacating in part, 9 FCC Rcd at 6373 ¶ 13 n.7, 6378 ¶¶ 61, 65. No issues were designated against RAM in this proceeding. Because RAM therefore lacked appropriate notice and adequate opportunity to rebut the charges made against it, the findings are invalid as to their prejudicial effect on RAM. See West Coast Media, Inc. v. FCC, 695 F.2d 617, 619 (D.C. Cir. 1982). They are not essential to the resolution of the remaining issues in this proceeding, and they were properly deleted. To the extent that Capitol asserts that there are unresolved questions concerning RAM's conduct, such allegations may be considered by the Bureau to determine if further Commission action against RAM is warranted.

21. As a final matter, we note that the ALJ denied a Joint Motion for Approval of

Consent Agreement, filed by the parties. The ALJ held that, under 47 C.F.R. § 1.93, a consent agreement is inappropriate in a hearing proceeding, such as this, involving a party's basic statutory qualifications. Although the Board considered the parties' exceptions addressing this issue moot, it invited the Commission to clarify the applicable law. 11 FCC Rcd at 2342 ¶ 33. We hold that the ALJ's ruling is correct. The Commission explained, in La Star Cellular Telephone Co., 11 FCC Rcd 1059, 1060-61 ¶ 13 (1996), that this is the proper interpretation of 47 C.F.R. § 1.93.

#### V. ORDERING CLAUSES

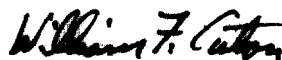
22. ACCORDINGLY, IT IS ORDERED, that the Application for Review, filed March 25, 1996, by Capitol Paging, IS GRANTED in part, IS DENIED in part, and DISMISSED in part, and the Decision of the Review Board, FCC 96R-1 (Feb. 23, 1996) (11 FCC Rcd 2335) IS MODIFIED to the extent indicated above.

23. IT IS FURTHER ORDERED, That pursuant to Section 503(b) of the Communications Act, as amended, Capitol Radio Telephone, Inc. d/b/a/ Capitol Paging SHALL FORFEIT to the United States the sum of two thousand dollars (\$2,000) for the willful and repeated violation of Section 90.405(a)(3) and 90.425(b)(2) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within forty (40) days from the date of this order, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

24. IT IS FURTHER ORDERED. That copies of this memorandum opinion and order SHALL BE SENT to all parties, return receipt requested.

25. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary